IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 502 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GABHAJI B. THAKORE - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR DHARMESH V SHAH for Petitioner(s) : 1,
Mr. Dipen Desai, AGP for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 1 - 2.
Mr. Sanjiv D. Dave, for NANAVATI & NANAVATI for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 05/07/2006
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

Mr. Dharmesh Shah, learned advocate for petitioners. Mr. Dipen Desai, learned AGP for respondent No.1. Mr. Sanjiv D. Dave, learned advocate on behalf of Nanavati & Nanavati for respondent No.2.

2. Heard learned counsel for the parties. By this petition under Article 226 of the Constitution of India, the petitioner seeks to partly challenge the constitutional validity of Gujarat Act No. 12 of 2003 known as “Gujarat Regularisation of Unauthorised Development (Amendment) Act, 2003”.

3. It is to be seen that, original Act, “Gujarat Regularisation of Unauthorised Development Act, 2001 (Act No. 23 of 2001)” was first published after having received the accent of the Governor in the Gujarat Government Gazette on 1st September 2001 which is deemed to have come into force on 22nd November 2000. The Act, from

its very language, appears to have been enacted for regularising illegal constructions on payment of some compounding fee known as 'impact fee'. Section 2(a) of the Unamended act provided that notwithstanding anything contained in the relevant law or in the order issued or the decision taken under the relevant law, directing removal, pulling down or alteration of unauthorised development, where in the opinion of a designated authority a person has at any time before 22nd November 2000 made some unauthorised development and such unauthorised development having regard to the provisions of Section 4 requires to be regularised, the said authority, within such period and in such manner as may be prescribed, serve on the person a notice requiring him within such period not being less than a month as may be specified therein to comply with such requisitions made under section 4 and specified therein and to pay to the designated authority such fees per square metre

of each category of unauthorised development as may, subject to the provisos, be determined by the designated authority and specified therein. The first Proviso, appended to Section (a) of Section 2, provided that the fees shall have the two limits of minimum and maximum. The second Proviso provided that different rates of fees may be determined by the designated authority for different categories of unauthorised development in different areas and for different unauthorised uses. A Table of Fees is appended to Section 3 which provides different charges within the limits of maximum and minimum on basis of per square metre.

4. According to the petitioner, in accordance with the said law notices were issued to them and the petitioners filed their applications for compounding and regularisation of the unauthorised construction. Their submission further is that the matter was kept

pending for some time but no action was taken by the Authority and during pendency of the applications, “Gujarat Regularisation of Unauthorised Development (Amendment) Act, 2003 (Act No. 12 of 2003)” was brought in force, which, inter alia, provided amendment of Section 3, especially in sub-section (2). It is to be seen that, in clause (a), the words “per square metre of each category of unauthorised development as may, subject to the provisos, be determined by the designated authority and specified therein” have been deleted, and consequently both the Provisos have also been deleted. As the provision, relating to “fee per square metre”, has been deleted from clause (a) of sub-section (2) of Section 3 of the Act, the Table of Fees has also been deleted.

5. It is further to be noted that, in clause (a), for the words “per square metre of each category of unauthorised development as may,

subject to the provisos, be determined by the designated authority and specified therein", the words "as may be prescribed by the State Government" are to be substituted. It is to be seen that the word "prescribed" has been defined in Section 2(f) of the Act to mean 'prescribed by rules made under Section 9'. Exercising the powers conferred upon the Government by Section 9 read with Section 3 of the Act, the Government has made the rules further to amend the "Gujarat Regularisation of Unauthorised Development Rules, 2001. New Rule 3(A) is to be inserted after Rule 3. Rule 3(A) provides for rate of fees for regularisation of unauthorised development. The Table appended to Rule 3(A) provides different charges for different units.

6. According to the petitioner, the amendment carried in clause (a) of Section 3(2) of the Act and consequent deletion of the Proviso and the Table of Fees and provisions of Rule 3(A)

are ultra vires the Constitution because the Government now cannot arm the concerned authority with the powers to treat the unequals as 'equals'. It is further submitted that the earlier provisions were in accordance with fairplay and equity because a person who has committed a wrong to a little extent could not be treated equal to a person who had committed wrong to a larger extent or vice versa. It is also submitted that Rule 3(A) incorporated by the amendment treats the unequals as 'equals' and thereby violates the provisions of Constitution and the fundamental rights of the petitioners.

7. It is to be seen that, validity of the Act was put to a scrutiny in the matter of ***Pranjivan Harjivan Parmar Vs. State of Gujarat & Ors., 2003 Vol.3 GLR Page 2516***. In the said matter, the petition was brought before the Court *pro bono publico* and it was submitted to the Court that enforcement of the Act will lead to

encouraging illegality and corruption. It was also submitted before the Division Bench that the Government is creating a different class and as such it deserves to be quashed. The High Court upheld the validity of the Act and observed that the State Government is obliged to consider the socio-economic aspects and factors and the socio-economic fabric of the society cannot be permitted to be disturbed by leading to a chaotic or destructive situation in a civilised and organised society. The Court also observed that the Government decided to pass the impugned Act in the larger interest of public and to protect and safeguard the interest of various sections of people mainly common persons, fixing regularisation fees on accepted norms and rational and also basing it on the theory of compound charges and penalties on the buildings constructed unauthorisedly and in violation of rules and regulations.

8. For Article 14, the High Court observed that, Article 14 prohibits class legislation and not reasonable classification for the purpose of legislation. The Court observed that if a legislation deals equally with members of a well-defined class, it will not be open to the charge of denial of equal protection.

9. After the Constitutional validity of the Act was upheld, the Act was amended and new Rule 3(A) was inserted in the Statute. The grievance of the petitioner is that the charges per square metre are reasonable and the persons belonging to different class cannot be treated equal. His submission is that a person who makes illegal construction to the extent of one metre in a 40 metre plot will have to pay Rs. 1000 and if another person makes illegal construction much beyond one metre in the same area of plot, then he is also required to be pay Rs. 1,000 as compounding fee or impact fee. It is this

inequality which is sought to be challenged by the petitioner.

10. Learned counsel for the petitioner placed his strong reliance on the Judgment of the Supreme Court in the matter of ***Kunnathat Thathunni Moopil Nair etc. Vs.State of Kerala and another, AIR 1961 S.C. 552,*** to submit that in the said case Section 5A of Travancore-Cochin Land Tax Act was held to be unconstitutional because it imposed unreasonable restrictions on the right to hold property, safeguarded by Article 19(1) of the Constitution. After taking us through the Judgment, it was submitted that the Government could not put the flat rate policy irrespective of the yield which one was getting from the property and could also not apply the same standards to the unequals less appreciating that the property may be equal but its use and the yield may be different. The said matter was relating to imposition of tax. In Paragraph 7 of

the said Judgment, the Supreme Court had observed that the most important question which arose for consideration in those cases was whether Article 265 of the Constitution would be a complete answer to the attack against the constitutionality of the Act. The Supreme Court observed that, ordinarily taxing Statutes are taken on their face value and so long as there is a rational basis for a classification, Article 14 will not be in the way of such a classification resulting in unequal burdens on different classes of property. The Supreme Court further observed that, if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of same kind of property.

11. Before we proceed to consider the submissions made by the learned counsel for the petitioner, we must immediately say that the

compounding charges termed as 'impact fee' in fact are not tax. These are not even fees though these have been termed as 'fees'. Where a fee is charged by an authority under some authorisation then principles of quid pro quo would apply. After charge of the fee some services are required to be provided. This shows the distinction between 'tax' and 'fees'. A 'tax' is the liability while the 'fee' is paid in anticipation of some services. In the present matter, though the charges have been named as 'impact fee' but in fact neither these are taxes nor fees. These are compounding charges in form of a penalty. For a wrong done by a person who has made some unauthorised construction in absence of the present law the competent authority had right to demolish such an illegal construction. The Government thought that every demolition leads to disharmony and law and order situation, therefore, to some extent small illegalities may be condoned and may be

compounded on payment of some charges. The Authority does not charge tax in case of compounding or condoning the lapses nor the Authority can charge any fees in case of condoning the lapses and compounding the illegality. In fact the Government, by the enactment, authorised the competent authority to compound the illegality provided it comes within the periphery and purview of Section 3(a)(i)(ii) of the Act. Every illegality, even otherwise, is not to be compounded on payment of any fees as would be clear from sub-clause (2) of clause (a) of sub-section 2 of Section 3 the Act. There again, a discretion is given to the designated/competent authority to go for compounding.

12. True it is, that in case of taxing Statute if irrationality is shown and equals are being treated unequally, then a challenge to the constitutional validity of the Act may be

sustained, but, in the present case, the position is totally different.

13. Sub-section (2) of Section 3 of the Act earlier provided that the compounding fee would be on basis of per square metre and in accordance with the Fee Table appended to sub-section (3). The said provision has been deleted and consequently the Table of Fee has also been deleted. In place of it, the Government has provided that the compounding would be in the manner “as may be prescribed by the State Government”. We have already observed that, Section 2(f) of the Act provides the meaning of the word “prescribed”. Exercising the powers vested in the Government under Section 9 read with Section 3 of the Act, the Government, now, has provided a levy of the charges by introducing Rule 3(A) to the said Rules.

14. So far as the question of treating unequals as 'equals' or equals unequally is concerned, the argument may appear to be lucrative, but, on a thorough probe, it would appear to be absolutely hollow and misconceived. In the matter of ***Kunnathat Thathunni Moopil Nair etc. Vs.State of Kerala and another,*** referred to above, Their Lordships of the Supreme Court have referred to the Judgment in *Ram Krishna Dalmia vs. Justice S.R. Tendolkar,* and have quoted the following passage;

> *"A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike*

down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself." (p. 299 of the Report (of SCR):(at p.548 of AIR)."

After quoting the said passage, the Supreme Court observed that the observations quoted in the said

judgment from the unanimous judgment of the Court shall apply with full force to the provisions of the Act and the Act introducing Section 5A deserved to be struck down. In the abovereferred passage, the Supreme Court had observed that “in determining the question of the validity or otherwise of such a Statute, the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of selection or classification”. If that principle is available for application, then the Court would be required to see whether Rule 3(A) treats persons differently who are otherwise equal. Earlier, the compounding charges were based on 'per metre basis', but, after the amendment and introduction of Rule 3(A), the

persons have been classified on strength of the plot-wise area. It is not the case of the petitioner that persons who are having building unit/plot upto 40 sq.mtrs., are being treated differently or persons belonging to yet another class are being treated equal to the persons holding plot/building unit upto 40 sq.mtrs. The Government has made a reasonable classification by providing limits of the plots upto 40 sq.mtrs.; above 40 sq.mtrs. upto 100 sq.mtrs built-up area; and above 100 sq.mtrs. upto 150 sq.mtrs. This relates to Independent Building (excluding flat/apartment and commercial use). The 2nd group is of the building owners who are having flat/apartment type residential buildings. The Government has made yet third category in relation to unauthorised commercial uses. In Rule 3(A), the Government has provided 3 categories; the first category is of independent building (Excluding Flat/Apartment & commercial use); the second category is of Flat/Apartment

type residential buildings; and thirdly, unauthorised commercial use. After making such a reasonable classification, different persons, having different size of plots are classified. Now, this classification cannot be said to be unreasonable. One could understand that holders of the small plots/building units are treated 'equal' with other categories. One could understand the argument of inequality in case the holders of the small plots/building units were treated at par with the persons who had put up property for commercial use. If the Government classifies the property and thereafter makes a classification on basis of the size of the plots/building units, then it cannot be said that the classification is irrational, illogical or illegal.

15. Taking into consideration the totality of the circumstances and the laudable object with which the Act has been enacted, and further

taking into consideration that to avoid heart-burning in different classes of people the Act has been enacted, we are of the opinion that there is nothing wrong in the Act. The Act and the Rules cannot be held to be ultra vires the Constitution. The petition deserves to be and is accordingly dismissed. No costs.

[R.S. Garg, J.]

[M.R. Shah, J.]

RMR.